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In the Supreme Court of the United States

OCTOBER TERM, 1942

No. 3

UNITED STATES OF AMERICA UPON THE RELATION AND FOR THE USE OF THE TENNESSEE VALLEY AUTHORITY, PETITIONER

v.

W. V. N. POWELSON, ASSIGNEE AND SUCCESSOR IN INTEREST OF SOUTHERN STATES POWER COMPANY, A CORPORATION, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR PETITIONER ON REARGUMENT

This brief is intended to supplement rather than to supersede the original brief filed by the Government. We shall here discuss the scope of review and such other aspects of the case as may not have been sufficiently stressed heretofore.

I

UNDER SECTION 25 OF THE TENNESSEE VALLEY AUTHORITY ACT IT WAS THE DUTY OF THE CIRCUIT COURT OF APPEALS TO REVIEW THE RECORD AND TO REACH AN INDEPENDENT JUDGMENT AS TO THE MARKET VALUE OF THE LAND IN SUIT WITHOUT GIVING PRESUMPTIVE WEIGHT TO THE AWARDS OR FINDINGS OF THE COMMISSIONERS OR THE DISTRICT COURT

1. Section 25 of the statute provides that the circuit court of appeals shall dispose of the appeal upon the record *without regard to the awards or findings theretofore made by the commissioners or district judges* and that it shall then *fix the value of the property.*

It is difficult to find any ambiguity in this language. The carefully selected words "without regard to the awards or findings theretofore made" should be given their plain meaning as requiring the circuit court of appeals to review the whole record and, on the basis of such review, to reach an independent judgment as to the value of the property in suit, without according presumptive weight to the prior awards or findings. This construction is supported by the direction that the court "fix the value of the property." Clearly, this is not a direction simply to review the prior awards for the purpose of determining whether they are supported by competent evidence. It is, rather, an express direction to the circuit court of appeals to make its own independent valuation based on its examination of the record.

Admittedly, this is an unusual provision. A careful search of the statutory law has revealed nothing comparable to it. It is therefore unlikely that the language used was the result of accident or mistake; it must have been deliberately chosen to accomplish a definite purpose. If the Congress had intended to provide for the usual type of review, it knew how to make that intention clear. Indeed, it could have accomplished that result by silence.

At the suggestion of the Court we have again reviewed the legislative history of this section.[1] It throws little light on the specific point in question. It does show, however, that the chairman of the House committee in charge of the original bill was particularly interested in the condemnation procedure; that this interest led him to seek the advice of experts on the subject; and that one version of this section, almost identical with the one finally adopted, was drafted by the then Assistant Attorney General in charge of the Lands Division of the Department of Justice. This history indicates that the section was carefully drafted by persons who were familiar with the problem and who knew what they wanted to accomplish.

[1] For the convenience of the Court we have printed the details of this legislative history in the Appendix, *infra*, p. 31.

The Circuit Court of Appeals for the Fifth Circuit has decided five cases arising under this section.[2] That court has recognized that the section contemplates an independent determination on the issue of value. In three of these five decisions it has found values substantially different from those embodied in the decisions of the three-judge district court,[3] and in two of those three it has reached results substantially different from those reached by either the commission or the district court.[4]

That court's construction of this section has been unambiguously stated by Judge Hutcheson in *United States* v. *Reynolds*, 115 F. (2d) 294, 296:

> If, therefore, this were an ordinary appeal and we sat in it as a court of errors, we should sustain the specifications directed to the reception of this evidence and reverse the cause. By the terms of the statute, however, this is not such an appeal.
>
> This court sits here in no sense as a court of errors. Its function and duty as expressly prescribed by statute is to dis-

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[2] *United States* v. *Bailey*, 115 F. (2d) 433; *United States* v. *Harris*, 115 F. (2d) 343; *United States* v. *Reynolds*, 115 F. (2d) 294; *Stephenson Brick Co.* v. *United States*, 110 F. (2d) 360; *Finley* v. *United States*, 118 F. (2d) 815.

[3] *United States* v. *Reynolds*, *United States* v. *Bailey*, *United States* v. *Harris*, all *supra*, note 2.

[4] *United States* v. *Reynolds*, *United States* v. *Harris*, both *supra*, note 2.

pose of the matter on the record without regard to the awards or findings theretofore made by the commissioners and District Judges and thereupon fix the value of the property sought to be condemned.

Only one other court has had occasion to consider this section. The question was before the Circuit Court of Appeals for the Sixth Circuit in *Welch* v. *Tennessee Valley Authority*, 108 F. (2d) 95, certiorari denied, 309 U. S. 688. There is language in that opinion which seems inconsistent with the view adhered to by the Fifth Circuit, but a careful study of the opinion shows that the court did in fact review the weight of the evidence and the credibility of the witnesses and made its own determination on the question of value.

2. The scope of review in this Court is coextensive with the scope of review in the circuit court of appeals. For, when a writ of certiorari has been granted, this Court has the power "to review the action of the court of appeals and direct such disposition of the case as that court might have made of it upon the appeal from the district court" (*Story Parchment Co.* v. *Paterson Co.*, 282 U. S. 555 at 567–568). See also *Langnes* v. *Green*, 282 U. S. 531, 536–537; *Dorchy* v. *Kansas*, 264 U. S. 286, 289; *Camp* v. *Gress*, 250 U. S. 308, 318; *Watts, Watts & Co.* v. *Unione Austriaca Etc.*, 248 U. S. 9, 21; *Baker* v. *Warner*, 231 U. S. 588, 593; *Delk* v. *St. Louis & San*

Francisco R. R., 220 U. S. 580, 588–589; *Lutcher & Moore Lumber Co.* v. *Knight*, 217 U. S. 257, 267–268. This Court thus has full authority to examine the entire record and make such disposition of the case as the court below should have made under section 25. Accordingly, if it should conclude that the valuation fixed by the court below is erroneous, it could proceed to determine the value here. Or, in the alternative, it could remand the case to the court below with directions to consider the evidence again and make another determination of value. But in either event the disposition by this Court would be preceded by a full review of the record as made before the Commission and supplemented in the district court to ascertain whether the value found and the principles applied by the circuit court of appeals were correct.

II

EVEN UNDER A NARROW CONSTRUCTION OF SECTION 25 OF THE TENNESSEE VALLEY AUTHORITY ACT, THE AWARD OF THE DISTRICT COURT WAS NOT ENTITLED TO PRESUMPTIVE WEIGHT IN THE CIRCUIT COURT OF APPEALS, AND THE AWARDS OF THE DISTRICT COURT AND THE CIRCUIT COURT OF APPEALS ARE NOT ENTITLED TO PRESUMPTIVE WEIGHT HERE

The court below construed section 25 to mean "merely that we are no [*sic*] to be bound by the findings of the trial court, but are to consider them in the light of the record, just as we consider similar findings in other appeals in which we have power to review the facts" (R. 1073–1074).

We submit that this construction does violence to the plain language of the statute. Even if it be accepted, however, we think it clear that the circuit court of appeals could not properly accord presumptive weight to the conclusions of the district court since such conclusions involved mixed questions of law and fact, resulted from and were manifestly controlled by errors of law, and were not supported by the evidence.

Similarly, the adoption by the circuit court of appeals of the opinion of the district court cannot entitle it to presumptive weight here under the rule that "*factual* [italics supplied] findings concurred in by two courts will be accepted by this Court unless clear error is shown" (*United States* v. *Appalachian Power Co.*, 311 U. S. 377, 403). Indeed, if the circuit court of appeals was in error in according presumptive weight to the opinion of the district court, either because of a failure properly to construe section 25 of the Tennessee Valley Authority Act or because of the nature of the district court's conclusions in this case, the fact that it misconceived the scope of its review should automatically render the concurrent-findings rule inapplicable.

A. *The conclusions of the courts below are based on mixed findings of law and fact*

The district court reached the ultimate conclusion that the property in suit had some value for water-power purposes and should be valued ac-

cordingly. It found that the property was physically adaptable for reservoir purposes, that the respondent and his predecessors had invested over a million dollars in an effort to develop it, and that there was an expanding market for electric power in the area. These facts are uncontroverted, but they are not sufficient in themselves to establish that there was any reasonable prospect that the property would be developed for power purposes by private interests in the reasonably near future nor that its physical adaptability for power purposes and the sums invested in it by respondent had actually enhanced its value as of the date of the taking. The facts necessary to support these conclusions were not found nor could they have been found from the evidence.

The district court's ultimate conclusion that the property had power value required determinations as to various subsidiary questions, both of fact and of law. These determinations are not to be found in its opinion. In such circumstances its conclusion and its award were not entitled to the presumptive weight accorded them by the circuit court of appeals.

> Where, as here, the finding is of an ultimate fact, and the law applied reposes in the mind of the court, it must be clear that the finding is at least a mixed finding of law and fact, as to which no presumption of correctness obtains. (*Johnson* v. *Kosmos Portland*

Cement Co., 64 F. (2d) 193, 195 (C. C. A. 6th), certiorari denied, 290 U. S. 641.)

Cf. Helvering v. *Tex-Penn Co.*, 300 U. S. 481, 491; *Bogardus* v. *Commissioner of Internal Revenue*, 302 U. S. 34, 39; *Exmoor Country Club* v. *United States*, 119 F. (2d) 961, 963 (C. C. A. 7th).

Similarly, the adoption of the district court's conclusion by the circuit court of appeals is not binding upon this Court. A like situation was before this Court in *United States* v. *Appalachian Power Co.*, *supra*. Both the district court and the circuit court of appeals, after a careful appraisal of the evidence, had held that the New River was nonnavigable. The respondent contended that this was a concurrent finding which ought not to be disturbed in the absence of a showing that it was clearly erroneous. This Court held that the ultimate conclusion of nonnavigability was not a finding of fact within the meaning of the rule.

It would seem equally clear that an ultimate conclusion on the question of whether this land had water-power value involves "questions of law inseparable from the particular facts" (*United States* v. *Appalachian Power Co.*, at 404). To resolve these mixed legal-factual questions this Court "may review the facts in order correctly to apply the law" (*First National Bank* v. *Hartford*, 273 U. S. 548, 552).[5]

[5] The question discussed above is different from the question of judicial review of the determinations of an expert

B. *The "findings" as to the market value of the property are not binding because they are based on erroneous principles of law*

The district court found that the property in suit had value as the site of a hydroelectric development and proceeded to determine what that value was. While, as we have previously stated (*supra*, pp. 7–8), the district court made certain general findings, it made no specific findings which would support its conclusion as to value. The failure to make such findings is explained by the fact that there was no evidence in the record on which they could be based. In the absence of evidence to support a finding as to market value, the court based that value on a misconception of the prices paid by the Government for other lands (R. 1058–1059).[6]

This was clearly erroneous. Evidence as to prices paid by the Government for other lands is

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administrative body. For, in the latter situation, this Court has recognized the peculiar competence of the administrative body to deal with the specialized questions committed to it, and its factual determinations, even if blended with rulings of law within the narrow field of its expert knowledge, may have a degree of finality not accorded to determinations of inferior courts. *Northern Pac. Ry. Co.* v. *United States*, No. 927, 1941 Term; *Board of Trade* v. *United States*, 314 U. S. 534, 548; *Gray* v. *Powell*, 314 U. S. 402, 412; *Interstate Commerce Commission* v. *Union Pacific R. R.*, 222 U. S. 541, 547.

[6] Although the court attempted to bolster its decision by a reference to the alleged investment of the respondent of "more than a million dollars" (R. 1058), the plain fact is that the actual cost to the respondent of the property condemned was only $277,821.56. See Government's main brief in this Court (hereinafter referred to as "Govt. Br."), p. 83.

not even admissible (Govt. Br. 84–87). The soundness of the rule excluding such evidence is well illustrated by the extraordinary use made of it by the district court in this case. The opinion states that the Government, by prior negotiations, had purchased 9,500 acres at a total price of $396,894.79, or an average price of approximately $41 per acre. This included property within the town of Murphy and improved tracts used for churches, schools, and mills having a much higher value per acre than the unimproved land of respondent (R. 898–899). For land comparable to that owned by respondent the Government paid $27.70 per acre (R. 909). The application of the $27.70-per-acre figure to respondent's property would have resulted in a valuation of approximately $325,000. The application even of the $41 figure would have resulted in a valuation of only about $492,000. The district court, however, made a different and altogether extraordinary use of these figures and, on the basis of that use, concluded that respondent's property below the contour line was worth $200 per acre. To reach that result it adopted what might be described as the "contrary-to-fact" or "let's suppose" formula. It stated that the Government's prior purchases had included 1,229 acres below the contour line and 8,271 acres above it; that *if* the average price paid for the portion below the contour line had been $200 per acre, the cost of such portion would have been $245,800;

that *if* the average price paid for the portion above the contour line had been $10 per acre, the cost of this portion would have been $82,710; and that the total cost of both portions, computed on this contrary-to-fact basis, would have been $328,510, or $68,384.79 less than the total price which was in fact paid by the Government for the 9,500 acres involved. Upon the basis of this abstract arithmetic the district court proceeded to the following *non sequitur*:

> Therefore it appears that the Tennessee Valley Authority has paid by voluntary purchase through private negotiations a price which is 20% more than the price basis herein found and fixed for the lands taken by the Tennessee Valley Authority from the Southern States Power Company by this action [R. 1059].

The hypothesis that the Government paid twenty times more per acre for that portion of the 9,500 acres purchased from other parties which lay below the contour line than for the portion above it is not only not supported by the evidence but is contrary to the admitted facts. Neither is there any evidence that that part of respondent's land lying below the contour line was worth twenty times as much as the part above. On the contrary, the record shows that all of his land was of the same general type and that even for reservoir purposes the acreage above the contour line was as necessary

and valuable as the acreage below that line (R. 900–902, 906–908). But since the *proportion* of respondent's holdings which lay below the contour line was far greater than the *proportion* of the other 9,500 acres purchased by the Government lying below that line, the application of the district court's "let's-suppose" formula resulted in an illusory and grossly inflated valuation of the property.

It seems clear that the circuit court of appeals was bound to reject a "finding" such as this, based as it was both on an erroneous conception of the law and a contrary-to-fact supposition. Instead, the circuit court of appeals adopted it and attempted to support it by relying on two additional and equally erroneous legal theories. The first of these was that the testimony of respondent as to the capitalized earnings of his proposed project is competent evidence as to the market value of the property. Clearly this was error (Govt. Br. 43–47).

The second erroneous theory of the Circuit Court of Appeals was that the value of the property to the condemnor should be considered in fixing its market value and that the award of the district court could be substantiated by the evidence in that regard (R. 1076, 1077–1078).

Since the so-called findings of both of the courts below as to the market value of the property resulted from the application to the evidence of

demonstrably erroneous legal theories, it follows that such findings are not binding and should be rejected. See *Alioto* v. *Imahashi*, 115 F. (2d) 324, 325 (C. C. A. 9th); *In re Holden's Trust*, 207 Minn. 211, 291 N. W. 104, 112 (1940); *Boardman* v. *Lorentzen*, 155 Wis. 566, 145 N. W. 750, 754–755 (1914).

C. The conclusion of the courts below that the property had water-power value is unsupported by and contrary to the evidence

The ultimate question to be determined is the price at which the land could have been sold in the open market in a voluntary cash transaction on the date of the taking. Its physical adaptability for dam-site purposes and the possibilities of its future development are important only insofar as they operated to increase the price at which the land could be sold.[7] The real question is whether the respondent has sustained the burden of showing that there was in existence, or in reasonable prospect at the time of the taking, a market demand for undeveloped land of this character for

[7] *Olson* v. *United States*, 292 U. S. 246; *Continental Land Co.* v. *United States*, 88 F. (2d) 104 (C. C. A. 9th), certiorari denied, 302 U. S. 715; *Brett* v. *United States*, 86 F. (2d) 305 (C. C. A. 9th); *Gilmore* v. *Central Maine Power Co.*, 127 Me. 522, 145 Atl. 137 (1929); *In re Simmons*, 130 App. Div. 356, 114 N. Y. Supp. 575 (1909), order aff'd, 195 N. Y. 573, 88 N. E. 1132 (1909), judgmtnt aff'd *sub nom. McGovern* v. *New York*, 229 U. S. 363.

use as a hydroelectric site. This question is necessarily one of degree. It depends upon the degree of remoteness or immediacy of the prospect of future development. Respondent is entitled only to the present value of that future prospect. He is not entitled to a valuation based on "the earning power of the development, if built" (R. 88). There is no evidence to support a finding of a market demand for this land for private power purposes. The respondent's witnesses on value did not purport to testify that any such demand existed. They merely capitalized a predicted profit and made an allocation to the property in controversy. The engineering witnesses for the Government stated flatly that there was no such market demand either in existence or in reasonable prospect. (Govt. Br. 11–12.) There are also certain undisputed facts which require the same conclusion.

First, there is the testimony as to the condition of the respondent's land holdings, the contingencies yet to be met, and the possible obstacles to be overcome. Respondent owned only a portion of the total land required, and before the possibility of the property's use for power purposes could have become a reality, it would have been necessary to acquire thousands of additional acres held by hundreds of individual owners (R. 324, 900; Govt. Br. 7–9). In all of the reported reser-

voir cases these facts have been regarded by the courts as highly significant in determining the degree of remoteness of the intended use.[8]

Second, there is the history of the property. For over twenty-five years the respondent and his predecessors had been attempting to promote its sale or development. Yet, at the end of that period no progress whatever had been made, no offers had been received, and no interested prospective purchasers or developers had been found (R. 342–343, 366, 385, 338). It is true that respondent was engaged in litigation for a part of this period, but that litigation had terminated by 1925, and at that time respondent owned substantially as much land as he did on the date of the taking. The period from 1925 to 1932 was one of rapid expansion in the electric utility industry in this area (R. 324–326, 337). The utility companies were adding to their capacity by new construction and were in the market for undeveloped sites. All of them had full knowledge of the Hiwassee River and its potentialities, but none of them showed any interest in this land (Govt. Br. 72).

The explanation which respondent has offered for the failure to develop a market for the property during this period is revealing. It is said

[8] *Olson* v. *United States*, *McGovern* v. *New York*, *Continental Land Co.* v. *United States*, all *supra* note 7; *New York* v. *Sage*, 239 U. S. 57; *Medina Valley Irr. Co.* v. *Seekatz*, 237 Fed. 805 (C. C. A. 5th).

that while the period from 1925 to 1932 was one of great expansion, it was also a period of high interest rates, and that while the period from 1932 to 1936 was one of low interest rates, it was also one of deflation. See respondent's main brief, pp. 58–59. It thus appears from respondent's own statement that the land could be marketed for reservoir purposes only during a period when business was expanding and interest rates were being maintained at a low level. The possibility that so rare an economic phenomenon might occur at some future date certainly could not have been a factor affecting the market value as of the date of taking.

By 1936, moreover, any prospective market for the property which formerly might have existed had disappeared. This was due to a combination of events. The improvements in the art of generation by steam had placed a ceiling on the wholesale price of large blocks of power sold on long-term contracts at about 3.5 mills per kw-hr (R. 868; Pet. Ct. Ex. H). As a result, very few new hydroelectric developments were feasible from a cost standpoint, and only the most exceptional undeveloped hydro sites could be marketed (R. 921). The stabilization of the power market resulting from the limiting effect of steam competition is made clear by the experience of the Authority itself. For several years it had been selling large blocks of power to the utility companies in the area at prices ranging between 3 mills and 3.5

mills per kw-hr (R. 956–957). When it attempted to secure a price of 3.6 mills per kw-hr from The Tennessee Electric Power Company, that company refused to purchase upon the ground that it could produce the power more cheaply itself (R. 960).

In the absence of any competent evidence to support the award of the courts below, respondent relies on the partial acceptance by the circuit court of appeals of his estimates as to predicted profits. While the circuit court of appeals appeared to give some weight to this testimony (R. 1076), it made no finding on any of the complicated questions of fact inherent in testimony of this type. Moreover, it would be impossible to give intelligent consideration to such evidence without making determinations on the critical subordinate issues.

Quite aside from the legal objections to the consideration of this type of proof (Govt. Br. 43–47), any finding of value based on this testimony would be contrary to the evidence. Respondent's entire case is based on the proposition that his proposed development would produce approximately 512,500,000 kw-hr annually of energy of the so-called "Saluda" or "superprimary" type at a cost of 3.75 mills per kw-hr and that this energy could be sold at a price of 6.34 mills per kw-hr. As previously pointed out (Govt. Br. 47–60), the overwhelming weight of

the testimony establishes that the cost of production at respondent's proposed plants would have been a minimum of 9.5 mills instead of 3.75 mills per kw-hr.

But even were the Court to accept all of respondent's testimony as to the cost of the power and disregard the testimony of the Government's witnesses on that question, the conclusive answer to respondent's calculated value is found in the fact that he could not have sold his output at a price sufficient to cover even his own estimated cost of production.

The capitalized structure which appears on respondent's Exhibit No. 282 rests upon the claim that because of the peculiar characteristics of the "Saluda" power which he proposed to produce at 35-percent load factor,[9] the entire output could be

[9] *Load factor* is defined as the ratio between average use and maximum demand. For example, if a given customer or group of customers have a peak demand utilizing 100,000 kw of capacity, while actually averaging a use of only 35,000 kw over any given period of time, the customer is then operating on a 35-percent load factor basis. The significance of this from the standpoint of the supplier of electricity is that he must have installed sufficient generating units to meet the peak demand even though the average use of such generating units is low. Capital charges must therefore be recovered through the sale of a relatively small number of kilowatt-hours. It is for this reason that the cost of such low load-factor power is higher than the cost of power sold at an average load factor of 50 to 60 percent, and the rate must be increased over the rate charged for power sold at the average load factor if the supplier of such low load-factor power is to recover his costs.

sold at a premium price of 6.34 mills per kw-hr. In brief, respondent's theory is that he would construct and operate his reservoirs and powerhouses in such a manner as to enable him to store water during the wet season when the other utilities had ample secondary power available at their run-of-the-stream projects and to concentrate his output during the dry months and use it to supply the surrounding systems when they had insufficient power available. In this way the power produced at these proposed projects was to be used to firm up the run-of-the-stream secondary power of the surrounding utilities.

Respondent's designation of his projected output as "Saluda-type" power was derived from the fact that the Lexington Water Power Company made contracts in 1927 with the Duke Power Company and the Carolina Power & Light Company to sell the output of its Saluda plant upon a similar basis. It is on the basis of these contracts that respondent arrived at his selling price of 6.34 mills (R. 203; Res. Exs. 230, 231). It was his contention that since those contracts, *executed almost ten years prior to the date of the taking,* provided for such a price, it was reasonable to suppose that his power could be sold at that price also.

The price at which this class of power could be sold in the area in 1936 depended, however, not upon the terms of contracts executed by other parties in 1927 but upon two easily determined fac-

tors: (1) the specific needs of the utility systems in the surrounding area for this type of power, and (2) the cost at which those systems could produce the same kind of power themselves. It was conceded that the only possible market for a block of power of the size contemplated by the respondent was the existing utility systems—and for all practical purposes, only the Duke system and the southeastern companies of the Commonwealth and Southern system (R. 708, 959).[19] Those systems would purchase power produced by the respondent only if it could be obtained for less than the cost to them of producing the equivalent power on their own systems. The selling price of respondent's power would thus have been limited by the alternative cost of producing equivalent power by steam plants on the systems of the Duke and the Commonwealth and Southern Companies.

Dean Moreland, of the Massachusetts Institute of Technology, who has specialized for years as an adviser to utility systems on methods of supplementing their power supply and who has on frequent occasions acted as special adviser to both the Duke and the Commonwealth and Southern Companies, testified from his intimate knowledge of the system characteristics of those companies

[19] It was one of the southeastern companies of the Commonwealth and Southern system, The Tennessee Electric Power Company, which refused to purchase power from the Authority at 3.6 mills per kw-hr on the ground that it could produce the power more cheaply itself (R. 960).

that power equivalent to that proposed to be produced by the respondent could be produced by steam plants on their own systems at a cost slightly in excess of 3 mills per kw-hr (R. 868; Pet. Ct. Ex. H). He made it clear that in 1927, when the Saluda contracts were made, the cost of generation by steam in this area was somewhere between 6 and 7 mills per kw-hr and that the agreement to pay the price of 6.34 mills in 1927 was based upon that alternative cost (R. 856–858). Improvements in the art of steam generation in the period between 1927 and 1936 and changes in the systems of the utilities had reduced that alternative cost to about 3 mills, and neither the Duke nor the Commonwealth and Southern Companies could afford to pay anything in excess of that cost for the power proposed to be produced by the respondent (R. 857–859, 868).

As this price is less than the respondent's own estimated cost of production of 3.75 mills, exclusive of charges for land value, this testimony alone, if accepted, destroys respondent's case. And it must be accepted because, for all practical purposes, it is uncontradicted. Respondent attempted to meet it by his witness Baumeister, but this witness conceded that he had no knowledge of the utility systems in the area, that his estimates of the cost of production by steam were based upon the cost of constructing an isolated plant not to be operated as a part of any existing

system, and that the cost of producing power by a plant operated as an integral part of one of the existing systems was an entirely different matter (R. 990–991). Furthermore, the record shows that this witness, in estimating costs, assumed a cost per kw of installed capacity substantially in excess of the actual costs of plants constructed in recent years, assumed a price of coal in excess of the price actually being paid by the Duke Power Company, and assumed the necessity for providing excessive spare capacity which was shown by Moreland to be unnecessary on the existing systems (R. 992, 994–996). The only other testimony offered on this question was that of the respondent himself. On this particular subject Powelson's qualifications were at least doubtful, as he had had no experience with the construction or operation of steam-generating plants since 1909 (Comm. Tr. 5618–5619). Baumeister admitted that the great improvements that had been made in the art between 1926 and 1936 completely changed the picture as to steam generation in the Southeast (R. 998).

It is important here to dispose of one issue that has served to confuse this case. The respondent has gone to great length to prove that there existed in the southeastern area a steadily expanding market for electric power. This has never been denied by the Government. The existence of a market for power is not the point. Every-

one concedes that any power that might ultimately have been produced at these proposed plants could eventually have been absorbed in the market, but the question is—at what price? The respondent's capitalized value depends upon the validity of his assumption that he was proposing to offer a peculiarly valuable product for which the utilities would be willing to pay a price higher than the market price for ordinary primary power and that this premium price would render his development feasible.

The testimony of J. A. Krug, Chief Power Engineer of the Tennessee Valley Authority,[11] who had been in direct charge of the marketing activities of the Authority and had thereby become closely acquainted with the systems and needs of the utilities in the area, disposed of this assumption by establishing two fundamental facts: (1) that the going market price in the area for large blocks of ordinary primary power was about 3 mills per kw-hr (R. 960), and (2) that on the basis of their actual operating records during the 15-year period preceding the date of the taking, the neighboring utilities could have used only 13 percent of respondent's assumed output for the superprimary purposes for which it was intended (R. 962–964; Pet. Ct. Ex. R).

[11] Until recently chief of the power branch of the War Production Board and now deputy director for priorities.

Respondent has attacked this testimony by asserting that if the utilities had entered into contracts for the purchase of such power, they would have used the power contracted for to meet the requirements of their growing loads instead of installing new capacity on their own systems. This argument is merely that the companies would have used this contracted power as ordinary primary power to meet the base load on their systems. Clearly, no company would pay a premium for so-called superprimary power when its real need was for primary power. Krug stated that in all of his negotiations with the utility systems he had never heard any of them express an interest in 35 percent load factor power and that from his experience he was satisfied that they would not pay a premium for such power in excess of 0.5 or 0.6 of a mill per kw-hr above the market price of primary power (R. 956, 960–961). This testimony of Krug's is based upon a detailed knowledge of the needs of the utility systems, is nowhere successfully contradicted in the record, and, like Moreland's testimony, is sufficient in itself to destroy respondent's case.

The foregoing facts make it clear that the prospect of a demand for this land for power purposes by anyone except the Government was so remote that it had no substantial effect upon the price at which the land would be bought and sold

in the open market. The courts below have completely ignored these pivotal facts and have tried and decided this case on false issues. The prior awards have been largely determined by mistaken ideas as to the equities of respondent's position.

Two plausible arguments which have been pressed upon and accepted by the courts probably account in large part for the results so far reached. The first is that since the respondent and his predecessors spent approximately a million dollars in attempting to promote this development, it is only fair to reimburse respondent in full in this proceeding. This reasoning ignores the fact that most of the expenditures were of a type that added nothing to the value of the land and could not have influenced the price to be paid by a prospective purchaser (R. 292–309, 314–318; Res. Ex. 187; Govt. Br. 83–84). It also overlooks the fact that respondent was fully aware that he was taking a long chance when he put his money into an attempt to promote the development of this site. In such ventures the odds are that the original capital will never be recovered. But the gamble may be worth taking because of the possibility of extremely large returns in the few ventures which are successful. Most of this money was spent during a period when there was great activity in undeveloped sites, and at that time the speculation had a fair chance of success. By 1936 respondent had already made his gamble

and lost. The Government cannot be expected to make good losses sustained in such undertakings.

The second fallacy that appears improperly to have influenced the result reached below is the assumption that because the Government selected this site for a multi-purpose development, it therefore possessed value as the site for a private development. That assumption involves errors both of law and of fact. It ignores the elementary rule that in an eminent-domain proceeding the market to be considered is one from which the demand created by the taker must be excluded from consideration.[12] It also proceeds on the false premise that any site favorable for Government development is necessarily attractive to private capital. It thus ignores distinguishing features present in this case that need only be listed:

1. The fact that this site was selected by the Government, not because of its attractiveness as a power site but because it was an essential part of the flood-control plan (R. 926; Res. Ex. 204, pp. 18–20, 96, 99);

2. The fact that as a power project this dam is valuable to the Government, not primarily because of the power generated at the site but be-

[12] *Olson* v. *United States*, 292 U. S. 246; *McGovern* v. *New York*, 229 U. S. 363; *New York* v. *Sage*, 239 U. S. 57; *Five Tracts of Land* v. *United States*, 101 Fed. 661 (C. C. A. 3d); *Continental Land Co.* v. *United States*, 88 F. (2d) 104 (C. C. A. 9th), certiorari denied, 302 U. S. 715; *In re Bensel*, 230 Fed. 932 (S. D. N. Y.)

cause of the effect of its storage on the Government's downstream projects (R. 925–929);

3. The low interest rate available to the Government, a factor of controlling importance in the cost of hydroelectric power (R. 926–927).

For all of the reasons stated, we think it clear that the awards of the courts below were not only contrary to but entirely unsupported by the evidence. Accordingly they can have no binding effect on this Court.[13]

III

BECAUSE OF THE IMPORTANCE OF THIS CASE, THIS COURT SHOULD DECIDE ALL OF THE ISSUES INVOLVED

The questions involved in this case are vitally important to the Government's entire land acquisition program. Heretofore, the courts, recognizing the natural tendency of the triers of fact to sympathize with landowners deprived of their property against their will, have set up certain safeguards to protect the condemnor against excessive awards based on speculative contingencies. Prior to the opinions of the courts below in this case, the rules embodying these safeguards have been regarded as definitely settled and have been consistently applied. Among the more important of these rules are the following:

1. In ascertaining the value of undeveloped property, the landowner's plans for future development are not to be considered.

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[13] *Beyer* v. *LeFevre*, 186 U. S. 114, 119; *Darlington* v. *Turner*, 202 U. S. 195, 220.

2. The landowner may not establish the value of undeveloped property by estimating the annual profit that might be earned by a business to be located on the property and by capitalizing the estimated profit.

3. In determining the market value of property, the value to the taker for his particular needs is not to be considered.

4. In determining the market value of property, the prices paid by the condemnor for other property needed for the same project are not to be considered.

5. Severance damages will not be awarded except upon a showing that the lands claimed to have been severed were either physically contiguous to the lands taken or were at the time of the taking united with them in an existing use.

As we read the opinion of the court below, it either repudiates or ignores each of these standards. Unless those erroneous rulings are corrected, they are likely not only to have a serious adverse effect upon the numerous condemnation proceedings in the Tennessee Valley area, where the opinion of the court below will undoubtedly carry great weight, but also to promote litigation that might otherwise be avoided through negotiated purchases. In these circumstances and in view of the great importance of the questions involved, we urge that the Court exercise its undoubted power and dispose of all of the issues involved. Cf. *Cole* v. *Ralph*, 252 U. S. 286, 290;

Liberty Oil Co. v. *Condon Bank*, 260 U. S. 235, 245; *Story Parchment Co.* v. *Paterson Co.*, 282 U. S. 555, 567–568.

CONCLUSION

The judgment below should be reversed.

Respectfully submitted.

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APPENDIX

LEGISLATIVE HISTORY OF SECTION 25 OF THE TENNESSEE VALLEY AUTHORITY ACT

The Tennessee Valley Authority Act was the outgrowth of four bills introduced in the Seventy-third Congress. These were S. 1272, introduced by Senator Norris; H. R. 4859, introduced by Representative McSwain; H. R. 4860, introduced by Representative Almon; and H. R. 5081, introduced by Representative Hill. The bill actually reported in the House by the Committee on Military Affairs was that introduced by Mr. Hill, H. R. 5081, and the act as passed represented a compromise reached in conference between the Hill bill and the Norris bill.

The provisions of the Norris bill relating to condemnation were contained in section 26. This section of the Norris bill was substantially the same as section 25 of the act as passed, but without the last two paragraphs which were added in conference. The language of the Norris bill relating to appeals from district courts to circuit courts of appeals was exactly the same as that now contained in section 25.

Provisions of the McSwain and Almon bills relating to condemnation appeared in section 23 of each bill. With the exception of slight variations in punctuation, this section was the same in both of these bills. The procedure provided

for under the McSwain and Almon bills was substantially the same as that provided for in the Norris bill and in section 25 of the act as finally enacted. That portion of section 23 of the McSwain and Almon bills relating to appeals from district courts to circuit courts of appeals was as follows:

> At any time within thirty days from the filing of the decision of the district judges upon the hearing on exceptions to the award made by the commissioners, either party may appeal from such decision of the said judges to the circuit court of appeals, and the said circuit court of appeals shall, upon the hearing on said appeal, dispose of the same de novo upon the record, without regard to the awards or findings theretofore made by the commissioners or the district judges, and such circuit court of appeals shall thereupon fix the value of the said property sought to be condemned.

This language differs from the corresponding provision of the Norris bill and from section 25 of the act as passed only in the inclusion of the two words "de novo" (and two commas which do not appear to affect the sense of the language used in any way).

The provisions of the Hill bill relating to condemnation were of an entirely different nature, contemplating a preliminary hearing before three commissioners and thereafter a trial de novo before a court and jury. As previously indicated, it was this bill which was reported by the House Military Affairs Committee (H. Rept. 48, 73d Cong., 1st sess.).

The origin of the provisions relating to condemnation contained in the McSwain bill is disclosed by the following colloquy which took place during the hearings before the House Military Affairs Committee between Representative McSwain and Representative Lloyd:

> Mr. LLOYD. I notice in section 23 of the proposed act a delegation of jurisdiction to the Federal court. I am wondering if anybody has made any study of that, and I am wondering how the Federal court can have any exclusive jurisdiction of these condemnation proceedings, where you have created a private corporation? You have created its residence by specific act in the State of Alabama, and as between the corporation and the citizens of the State of Alabama I am wondering how the Congress has any authority to lay the jurisdiction in the Federal court? It is not a part of the economic program at all, but it seems to me it would be unconstitutional.
>
> The CHAIRMAN. So far as Alabama is concerned, there may be a serious difficulty in the point that you make. This is really designed for the protection of the Government in Tennessee, as to that vast area of 55,000 or 60,000 acres of land that it would be necessary to acquire in order to constitute the bed of the Coal Creek Basin. We have had so many bitter experiences of the Government being imposed upon in their attempt to acquire land that I asked the Department of Justice to send their expert down here for a conference. Assistant Attorney General Richardson had two conferences with me, and based on his experience, growing out of hundreds and hundreds of cases all over the Nation, this provision has

been drawn by him. It is his language, adopted by us after we considered it. He told us this. For instance, they found it necessary to acquire a little lot of land somewhere on the New England coast. The preliminary commissioners estimated it to be worth about $1,100. They proceeded to condemn the land, it went finally to a jury, and the jury brought in a valuation verdict of $44,000 [*Muscle Shoals,* Hearings before the House Committee on Military Affairs, 73d Cong., 1st sess., p. 43].

Again, at a later point in the hearings, Representative McSwain, in response to a question by Representative James, stated:

> * * * I enlisted the assistance of the Department of Justice in drawing a condemnation statute that would prevent this authority from paying any excessive and unreasonable charges in condemnation proceedings.
>
> I have just been notified of an article appearing in one of the Tennessee newspapers, a Knoxville newspaper, indicating that there might be considerable speculation in real estate in the hope that something like exorbitant charges might be imposed upon this authority. I want to state and ask the newspapermen to carry it, that the people who own that land down there now, in Tennessee, will make a very serious mistake if they allow land speculators to come around and take options on it, or to take deeds on it, in the belief that the Government is going to pay exorbitant prices for the land in the Cove Creek Basin area. We are going to pay, of course, more than it is worth, but not any excessive, unreason-

> able, or inordinate prices. We have got a provision here that Mr. Lloyd and Mr. May have both considered with regard to condemnation proceedings [*id.* at 317].

The omission of the words "de novo" in the act as finally passed does not appear to be of any significance. The omission was probably the result either of a belief that the words were superfluous or of a fear that they might be construed as contemplating a right to introduce new evidence before the circuit court of appeals.[1]

Neither the committee reports nor the debates shed any additional light on the question. It is clear, however, that the sponsors of the various Tennessee Valley Authority bills used the greatest care in drafting the provisions of their respective versions relative to condemnation.[2] It is likewise

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[1] In this connection the decision of this Court in *Crowell* v. *Benson*, 285 U. S. 22, had indicated that one of the incidents of a hearing de novo was the right of the parties to introduce new or additional evidence. *Cf. St. Joseph Stock Yards Co.* v. *United States*, 298 U. S. 38; *Baltimore & Ohio R. Co.* v. *United States*, 298 U. S. 349. Hence, the elimination of the words "de novo" contained in the McSwain bill may well have been for the purpose of assuring against a construction requiring the circuit court of appeals to permit the introduction of evidence as well as to review independently the record of the proceedings below.

[2] In this connection it should be recalled that the question of excessive awards in condemnation cases had been considered at length by Congress only five years before, at the time of the enactment of the Flood Control Act of 1928, with the result that there was inserted in that statute a section providing for the ascertainment of the value of lands condemned by three commissioners rather than by a jury (45 Stat. 536, 33 U. S. C. sec. 702d). As was stated by the Cir-

clear that such provisions were considered by the House Military Affairs Committee and also by the conference committee. See H. Rept. 130, 73d Cong., 1st sess., p. 18. The very fact that the language of section 25 was given such careful legislative consideration constitutes a strong argument in favor of the literal construction accorded it by the Circuit Court of Appeals for the Fifth Circuit in the *Reynolds*, *Bailey*, and other cases.

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cuit Court of Appeals for the Eighth Circuit in *United States* v. *Hess*, 71 F. (2d) 78:

"Referring to the Congressional Record, it is disclosed that the question as to how the amount of compensation to land owners affected by the operation of the Flood Control Act was going to be determined was extensively debated in Congress. Volume 69, part 6, Cong. Record, pp. 6717 and 6783, April 18 and 19, 1928. The fear was repeatedly expressed that the cost of acquiring rights for the flood control project would be prohibitive. There was strenuous objection to submitting the question of the amount of assessment to juries in the several districts. The following statement was made on the floor of the House in the course of the debate and is illustrative of the common understanding of the purport of section 4 of the bill: 'It will not be a case comparable to juries rendering excessive damages against railroad companies because, in the first place, juries will not be used under this law, but only appraisers appointed by the judge.' Cong. Record, p. 6717." (Pp. 79–89.)

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